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Supreme Court of the United States

OCTOBER TERM, 1944

No. 688

THE BORDEN COMPANY,

Petitioner,

against

JOSEPH BORELLA, CHARLES J. BURKE, WALTER CROSS, WILLIAM L. DeGRAAF, JOHN B. DONEGAN, STANLEY GAJDA, EDWARD GRAMCKO, STANLEY GRZECK, OLE HOFSETH, WILLIAM KAY, ALEXANDER KRUPICA, WILLIAM LENDO, THOMAS LO SASSO, ROBERT A. MARSHALL, WALTER C. MENYHART, JAMES McCARTHY, MICHAEL NOVEMBER, LEONARD B. QUINN, ANDREW RUEB, THOMAS M. TREACY AND JESUS ECHEVARRIA,

Respondents.

BRIEF FOR PETITIONER

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Respondents.

BRIEF FOR PETITIONER

Opinions of Courts Below

The opinion of the District Court (R. 102-106) is reported in 52 F. Supp. 952.

The majority and dissenting opinions of the Circuit Court of Appeals, Second Circuit (R. 128-132) are reported in 145 F. (2d) 63.

Jurisdiction

Judgment of the Circuit Court of Appeals for the Second Circuit which petitioner seeks to have reviewed was filed on August 18, 1944 (R. 133). The petition for a

writ of certiorari was filed herein on November 16, 1944. The order of this Court granting certiorari was filed January 2, 1945 (R. 134).

The jurisdiction of this Court is based on Section 240 of the Judicial Code, as amended (Act of March 3, 1891, c. 517, Sec. 6, 26 Stat. 828; Act of March 3, 1911, c. 231, Sec. 240, 36 Stat. 1157; Act of February 13, 1925, c. 229, Sec. 1, 43 Stat. 938; U. S. C., Title 28, Sec. 347).

Statement of Case

The Circuit Court of Appeals for the Second Circuit ruled by a divided court that building service and maintenance employees, namely, porters, watchmen and elevator operators employed by petitioner, The Borden Company, in its office building at 350 Madison Avenue in the City of New York are engaged in the production of goods for commerce within the meaning of Section 7(a) of the Fair Labor Standards Act of 1938 (Sec. 7, 52 Stat. 1060, June 25, 1938, 29 U. S. C., Sec. 207(a)) and, therefore, entitled to overtime compensation under such Act (R. 128-132).

The ruling was made in reversing a judgment of the United States District Court for the Southern District of New York, which judgment was in favor of the petitioner and against respondents on the issues in the action on the merits (R. 121-122). The theory of said ruling was that though respondents had no relationship or tie with actual production of goods, they were engaged in the production because their work was "necessary" to the executives, accountants and other employees of The Borden Company whose office work in turn was necessary for the production of The Borden Company's products in distant places (R. 128-132).

Such judgment of the District Court was rendered in an action brought by the respondents who claimed in their complaint that they were engaged in commerce and the production of goods for commerce and entitled to recover over-

time compensation and reasonable counsel fees under the Fair Labor Standards Act of 1938 (R. 3-6). The petitioner interposed an answer in which it denied that the respondents were engaged in commerce or the production of goods for commerce and asserted that no manufacturing was done in the building owned by petitioner in which respondents were employed, that no goods were produced for commerce in such building and that the respondents were not covered by the Fair Labor Standards Act of 1938 (R. 7-11).

Petitioner, a New Jersey corporation, owns a twenty-four story office building at No. 350 Madison Avenue in the City, County and State of New York (R. 117, 128) in which it maintains its own office and it occupies, in whole or in part, approximately seventeen of the twenty-four floors and 58% of the total rentable area (R. 118, 128). The remainder of the building is occupied by various tenants who do not produce, manufacture, handle, process or in any other manner work on any goods in said building (R. 119, 120, 129).

While petitioner's business is that of processing, manufacturing, selling and distributing fluid, condensed and evaporated milk, casein ice cream, butter, cheese and various other products (R. 117, 128) such activities are not carried on in its office building involved in this case (R. 119, 128, 129). In other words, to use the language of the Act, petitioner does not produce, manufacture, handle, process or in any other manner work on any goods in said office building (R. 119, 128, 129). Such activities are carried on in various plants and factories of the petitioner throughout the United States and Canada (R. 117, 128).

The president, executive vice president, vice presidents, treasurer, assistant treasurers, secretary, assistant secretaries and other officers and subordinate employees of the petitioner are housed in said building and the board of directors of the petitioner holds its regular and special meetings therein. (R. 118, 128, 129).

The petitioner directs, supervises, manages and controls its entire business through the aforesaid directors, officers and employees (R. 118, 128).

In this building much of the advertising is devised though none of it is printed there (R. 118, 129). Labels for petitioner's products are designed in this building and some photostating takes place there (R. 119, 129).

The respondents are building maintenance employees, namely, porters, elevator operators and watchmen who are employed by petitioner in connection with the operation and maintenance of petitioner's office building (R. 118, 129).

The Circuit Court of Appeals accepted and adopted the facts as found by the Trial Judge (R. 117-120, 128, 129).

While the respondents claim that they were engaged in commerce and also in the production of goods for commerce within the meaning of the Fair Labor Standards Act of 1938 (R. 5) the Circuit Court of Appeals held that they were not engaged in commerce (R. 129) but were engaged in the production of goods for commerce (R. 129-132).

Specification of Errors

The Circuit Court of Appeals for the Second Circuit erred in holding that the respondents are engaged in the production of goods for commerce within the meaning of the Fair Labor Standards Act of 1938.

Relevant Provisions of Statutes Involved

Fair Labor Standards Act of 1938—(Act of June 25, 1938, c. 676, 52 Stat. 1060, 29 U. S. C., Sec. 201-219).

"Sec. 3. As used in this Act——

• • •

"(b) 'Commerce' means trade, commerce, transportation, transmission, or communication among the several States or from any State to any place outside thereof." (29 U. S. C. §203(b))

"(j) 'Produced' means produced, manufactured, mined, handled, or in any other manner worked on in any State; and for the purposes of this Act an em-

ployee shall be deemed to have been engaged in the production of goods if such employee was employed in producing, manufacturing, mining, handling, transporting, or in any other manner working on such goods, or in any process or occupation necessary to the production thereof, in any State." (29 U. S. C. §203(j))

"Sec. 7. (a) No employer shall, except as otherwise provided in this section, employ any of his employees who is engaged in commerce or in the production of goods for commerce——

"(1) for a workweek longer than forty-four hours during the first year from the effective date of this section,

"(2) for a workweek longer than forty-two hours during the second year from such date, or

"(3) for a workweek longer than forty hours after the expiration of the second year from such date, unless such employee receives compensation for his employment in excess of the hours above specified at a rate not less than one and one-half times the regular rate at which he is employed." (29 U. S. C. §207(a))

ARGUMENT

POINT I

The respondents are not engaged in the production of goods for commerce within the meaning of the Fair Labor Standards Act of 1938.

The Circuit Court of Appeals for the Second Circuit, held that the respondents in the case at bar are not engaged "in commerce" within the meaning of the Fair Labor Standards Act of 1938 but that they are engaged "in the production of goods for commerce" within the meaning of such Act.

It was because of this holding that such employees are engaged in the production of goods for commerce that

petitioner applied to this Court for a writ of certiorari. The order granting certiorari was filed on January 2, 1945. (R. 134).

In the case of *Kirschbaum Co.* v. *Walling*, 316 U. S. 517, this Court promulgated a test to be applied in determining whether an employee is engaged "in the production of goods for commerce" within the meaning of the Fair Labor Standards Act. According to this test an employee is engaged in such production if his work has such "a close and immediate tie" with the process of production as to be "an essential part" thereof; he is not engaged in such production if his work "has only the most tenuous relation to, and is not in any fitting sense" necessary thereto. This test has since been used by this Court and all other Federal Courts (the Circuit Court of Appeals for the Second Circuit excepted) in cases involving employee coverage under the Act.

Applying this test in the case of *Kirschbaum Co.* v. *Walling*, 316 U. S. 517, and in the case of *Walton* v. *Southern Package Corp.*, 320 U. S. 540, this Court held that the work of the building service employees therein considered had this required "close and immediate tie" with production. Such service employees worked in the buildings wherein goods were physically produced and they made a clear and convincing evidentiary demonstration of the existence of a "close and immediate tie" between their work and production. In the case of *Armour & Co.* v. *Wantock*, 323 U. S. 126, this Court held that the work of the fire fighters therein considered likewise was of such a nature as to bring them within the coverage of the Act. Such fire fighters worked directly in connection with the building wherein goods were physically produced and they likewise made a clear and convincing evidentiary demonstration of the existence of this "close and immediate tie" between their work and production.

The respondents have not made the same demonstration in the case at bar as was made by the building service employees in the case of *Kirschbaum Co.* v. *Walling*, 316

U. S. 517, and in the case of *Walton* v. *Southern Package Corp.*, 320 U. S. 540, or by the fire fighters in the case of *Armour & Co.* v. *Wantock*, 323 U. S. 126.

The respondents in the case at bar are obviously not engaged in the physical production of goods. They are not engaged in "producing, manufacturing, mining, handling, transporting or in any other manner working on * * * goods." (Sec. 3(j) Fair Labor Standards Act of 1938). They perform their respective servicing activities in the petitioner's office building and this building is situated far from the petitioner's plants and factories, in which plants and factories there are employees who are engaged "in producing, manufacturing, * * * handling, transporting or * * * working on * * * goods, or in any process or occupation necessary to the production thereof * * *." (Sec. 3(j) Fair Labor Standards Act of 1938)

The narrow question now presented to this Court is whether the respondents thus distantly removed from production are engaged in occupations necessary to such production.

Determination of this question is dependent upon a judicial construction of Sec. 3(j) of the Fair Labor Standards Act.

The judicial function of construing the law, does not include the legislative function of making the law. That point this Court made in the following part of its opinion in the case of *Western Union Telegraph Company* v. *Lenroot*, U. S. , 89 L. ed. 289:

> "But we take the Act as Congress gave it to us, without attempting to conform it to any notions of what Congress would have done if the circumstances of this case had been put before it."

The Circuit Court of Appeals for the Second Circuit took a diametrically opposite stand in its opinion in the case at bar when it said:

> "We can best reach the meaning here, as always, by recourse to the underlying purpose, and, with that

> as a guide, by trying to project upon the specific occasion how we think persons, actuated by such a purpose, would have dealt with it, if it had been presented to them at the time." (R. 130)

In other words, the Circuit Court of Appeals for the Second Circuit based its decision not upon a construction of the pertinent provisions of the Act, but upon how it thought Congress would have dealt with the respondents if they had been presented to Congress at the time. This is a legislative rather than a judicial approach, and explains while it does not justify the decision in the case at bar. It is respectfully submitted that if the Circuit Court of Appeals for the Second Circuit had adhered to its legitimate function of construing the law, it would have handed down an entirely different decision.

In the case of *Kirschbaum Co.* v. *Walling*, 316 U. S. 517, this Court not only designated the correct approach to construing the Fair Labor Standards Act, but in the following part of its opinion it pointed out that in this process of construing due consideration must be given to the fact that there are constitutional limitations upon Congressional legislative power and furthermore, that in enacting the Fair Labor Standards Act, Congress exercised its constitutionally limited legislative power only to a limited extent.

> "Federal legislation of this character cannot therefore be construed without regard to the implications of our dual system of government." (p. 520)
>
> • • •
>
> "We cannot, therefore, indulge in the loose assumption that, when Congress adopts a new scheme for federal industrial regulation, it thereby deals with all situations falling within the general mischief which gave rise to the legislation. Such an assumption might be valid where remedy of the mischief is the concern of only a single unitary government. It cannot be accepted where the practicalities of federalism—or, more precisely, the underlying assumptions of our dual form of government and the consequent

presuppositions of legislative draftsmanship which are expressive of our history and habits—cut across what might otherwise be the implied range of the legislation. Congress may choose, as it has chosen frequently in the past, to regulate only part of what it constitutionally can regulate, leaving to the States activities which, if isolated, are only local." (p. 521)

• • •

"The history of the legislation leaves no doubt that Congress chose not to enter areas which it might have occupied. As passed by the House, the bill applied to employers 'engaged in commerce in any industry affecting commerce.' See H. Rep. No. 2182, 75th Cong., 3rd Sess., p. 2; 83 Cong. Reg. 7749-50. But the bill recommended by the conference applied only to employees 'engaged in commerce or in the production of goods for commerce.' H. Rep. No. 2738, 75th Cong., 3rd Sess., pp. 29-30; 83 Cong. Rec. 9158, 9266-67. Moreover, in one of its intermediate stages, the measure incorporated the *Shreveport* doctrine, *Houston, E. & W. T. Ry. Co.* v. *United States, supra*, in that it was specifically made applicable to intrastate production which competed with goods produced in another State, S. 2475, 75th Cong. 3rd Sess., as recommitted December 17, 1937 §8(a). But, as reported by the House Committee on Labor, this provision was deleted. S. 2475, *supra*, as reported April 21, 1938; see H. Rep. 2182, *supra*." (pp. 522-523)

These are the limitations upon the scope of the Fair Labor Standards Act and these limitations must be recognized in any judicial construction of such Act. Without the guidance afforded by a conscious recognition of these limitations, what is ostensibly a judicial construction of the Act may in reality be a judicial amendment thereof.

It was due largely to the fact that the Circuit Court of Appeals for the Second Circuit failed to give appropriate consideration to these limitations that it erroneously held that the respondents in the case at bar who perform purely local functions in petitioner's office building come within the purview of the Act.

These limitations upon the scope of the Act affect the judicial construction of every term used therein. This was made unmistakably clear by this Court in its opinion in the case of *Kirschbaum Co.* v. *Walling*, 316 U. S. 517, when it said that the word "'Necessary' is colored by the context not only of the terms of this legislation but of its implications in the relation between state and national authority."

This brings us directly to the crux of the present case and that is the meaning of the word "necessary" as used in the phrase "in any process or occupation necessary to the production" of goods (Sec. 3(j) Fair Labor Standards Act).

The Act does not contain a definition of the word "necessary". Hence, since it is a term of ordinary speech, it means what it means "in ordinary intercourse in this context." (*Western Union Telegraph Company* v. *Lenroot*, U. S. , 89 L. ed. 289). This Court stressed the same idea in the case of *Addison* v. *Holly Hill Fruit Products, Inc.*, 322 U. S. 607, when it said:

> "Legislation introducing a new system is at best empirical, and not infrequently administration reveals gaps or inadequacies of one sort or another that may call for amendatory legislation. But it is no warrant for extending a statute that experience may disclose that it should have been made more comprehensive. 'The natural meaning of words cannot be displaced by reference to difficulties in administration.' *Commonwealth* v. *Grunseit* (1943) 67 C. L. R. 58, 80. For the ultimate question is what has Congress commanded, when it has given no clue to its intentions except familiar English words and no hint by the draftsmen of the words that they meant to use them in any but an ordinary sense. * * * After all, legislation when not expressed in technical terms is addressed to the common run of men and is therefore to be understood according to the sense of the thing, as the ordinary man has a right to rely on ordinary words addressed to him." (pp. 617-618)

The terms engaged "in the production of goods" or "in any . . . occupation necessary to the production" of goods

are not technical terms. (Sec. 3(j) Fair Labor Standards Act) Hence, they are "addressed to the common run of men" and are therefore "to be understood according to the sense of the thing, as the ordinary man has a right to rely on ordinary words addressed to him."

Ordinary men throughout this country have relied upon these ordinary words and their understanding has generally been that these words are not broad enough to bring office building service employees within the ambit of the Act. In this understanding they have been fortified by all the United States District Courts and Circuit Courts of Appeals which have passed upon the question.

Petitioner does not contend that the word "necessary" is synonymous with "indispensable", "essential" or "vital" (*Armour & Co.* v. *Wantock*, 323 U. S. 126).

But petitioner does contend that an occupation is not necessary if it merely has a "tenuous relation to" production or is necessary in an "ultimate sense" to production (*Kirschbaum Co.* v. *Walling*, 316 U. S. 517).

This Court in defining the word "necessary" as used in the Act has used the terms "close and immediate tie with", "essential part of", (*Kirschbaum Co.* v. *Walling*, 316 U. S. 517), "intimately related" and "connection * * * quite substantial" (*Warren-Bradshaw Co.* v. *Hall*, 317 U. S. 88).

By these definitions those who are necessary to others who in turn are necessary to still others who are engaged in actual production are not themselves engaged in production. Those who are twice removed from production would not have a "close and immediate tie with" production.

If these definitions are discarded then certainly a railroad which transports goods would be necessary to production and thus engaged in the production of goods for commerce. Maintenance-of-way men necessary to railroading would likewise be engaged in production and the cook who feeds them being necessary to the maintenance-of-way workers would also be necessary for production and so, engaged in production.

But in *McLeod* v. *Threlkeld*, 319 U. S. 491, this Court said at page 493:

> "McLeod was not engaged in the production of goods for commerce. His duties as cook and caretaker for maintenance-of-way men on a railroad lie completely outside that clause."

With respect to the loft building service employees in the case of *Kirschbaum Co.* v. *Walling*, 316 U. S. 517, this Court said:

> "The normal and spontaneous meaning of the language by which Congress defined in § 3(j) the class of persons within the benefits of the Act, * * * encompasses these employees, in view of their relation to the conceded production of goods for commerce by the tenants." (p. 524)

With respect to the office building service employees in the case at bar, however, "The normal and spontaneous meaning of the language" debars them in view of their tenuous, remote and insubstantial relation to the production of goods.

In the recent case of *Western Union Telegraph Company* v. *Lenroot*, U. S. , 89 L. ed. 289, this Court in its opinion, among other things, stated:

> "The Government contends that in defining 'produced' the statute intends 'handled' or 'worked on' to mean not only handling or working on in relation to producing or making an article ready to enter interstate transit, but also includes the handling or working on which accomplishes the interstate transit or movement in commerce itself. If this construction is adopted, every transporter, transmitter, or mover in interstate commerce is a 'producer' of any goods he carries. But the statute, while defining 'produced' to mean 'handled' or 'worked on' has not defined 'handled' or 'worked on.' These are terms of ordinary speech and mean what they mean in ordinary intercourse in this context. They serve a useful purpose when read to relate to all steps, whether

> manufacture or not, which lead to readiness for putting goods into the stream of commerce. One who packages a product, or bottles a liquid, or labels, or performs any number of tasks incidental to preparing for shipment might otherwise escape the Act, for in a sense he neither manufactures, produces, or mines the goods. We are clear that 'handled' or 'worked on' includes every kind of incidental operation preparatory to putting goods into the stream of commerce." (p. 296)

The same may be said with respect to "production" and occupations "necessary to . . . production". These include "every kind of incidental operation preparatory to putting goods into the stream of commerce". Respondents in the case at bar, however, do not perform any of such operations.

The petitioner's contention in the case at bar is supported by every decision handed down by Circuit Courts of Appeals and United States District Courts, excepting the decisions of the Circuit Court of Appeals for the Second Circuit in the case of *Callus* v. *10 East Fortieth Street Building, Inc.*, 146 F. (2d) 438 (Dec. 12, 1944), and in the case at bar. (*Rucker* v. *First Nat. Bank of Miami, Okl.*, 138 F. (2d) 699, C. C. A. 10, certiorari denied, 321 U. S. 769; *Lofther* v. *First Nat. Bank of Chicago*, 138 F. (2d) 299, C. C. A. 7; *Stoike* v. *First Nat. Bank of City of New York*, 290 N. Y. 195, certiorari denied, 320 U. S. 762; *Johnson* v. *Masonic Bldg. Co.*, 138 F. (2d) 817, C. C. A. 5, certiorari denied, 321 U. S. 780; *Johnson* v. *Dallas Downtown Development Co.*, 132 F. (2d) 287, C. C. A. 5, certiorari denied, 318 U. S. 790; *Convey* v. *Omaha Nat. Bank*, 140 F. (2d) 640, C. C. A. 8, certiorari denied, 321 U. S. 781; *Tate* v. *Empire Building Corporation*, U. S. District Court, Eastern District of Tennessee, 2 WH Cases, 472, not officially reported, aff'd 135 F. (2d) 743, C. C. A. 6, certiorari denied, 320 U. S. 766; *Rosenberg* v. *Semeria*, 137 F. (2d) 742, C. C. A. 9, certiorari denied, *sub nom Semerio et al.* v. *Rosenberg*, 320 U. S. 770; *Cochran* v. *Florida Nat. Bldg. Corporation*,

45 F. Supp. 830, aff'd 134 F. (2d) 615, C. C. A. 5; *Blumenthal* v. *Girard Trust Co.*, 141 F. (2d) 849, C. C. A. 3; *Building Service Employees International Union* v. *Trenton Trust Company*, 142 F. (2d) 257, C. C. A. 3; *Hinkler* v. *Eighty-Three Maiden Lane Corporation*, 50 F. Supp. 263; *Cullen* v. *Stone & Webster*, U. S. District Court, Southern District of New York, 7 WHR 147, not officially reported; *Brandel* v. *Continental Illinois Nat. Bank & T. Co.*, 43 F. Supp. 781; *Baldwin* v. *Emigrant Industrial Savings Bank*, U. S. District Court, Southern District of New York, 7 WHR 831, not officially reported; *Wideman* v. *Blanchard & Calhoun Realty Co.*, 50 F. Supp. 626, *Bozant* v. *Bank of New York*, 8 W. H. R. 68 not officially reported U. S. D. C., S. D. N. Y.).

Except for the two decisions in the Circuit Court of Appeals for the Second Circuit, all courts have put office building service employees in one category irrespective of the office activities carried on by the tenants occupying the building wherein such employees are employed. Whether the tenants in these office buildings were engaged in "interstate commerce" or whether some of the tenants in these office buildings were elsewhere engaged in the production of goods for commerce, the United States District Courts and the Circuit Courts of Appeals unanimously and consistently have held that the service employees employed in such buildings are outside the scope of the Act.

The fact that the petitioner in the case at bar is the owner of the building rather than the owner's lessee has no materiality in the determination of the question now presented to this Court. *Kirschbaum Co.* v. *Walling*, 316 U. S. 517 at 524, 525.

While in most of the cases cited above it does not appear that the tenants in the office buildings were elsewhere engaged in the production of goods for commerce, in the cases of *Rucker* v. *First Nat. Bank of Miami, Okl.*, 138 F. (2d) 699, C. C. A. 10, certiorari denied, 321 U. S. 769; *Johnson* v. *Dallas Downtown Development Co.*, 132 F. (2d) 287, C. C. A.

5, certiorari denied, 318 U. S. 790; *Johnson* v. *Masonic Bldg. Co.*, 136 F. (2d) 817, C. C. A. 5, certiorari denied, 321 U. S. 780; and *Lofther* v. *First Nat. Bank of Chicago*, 138 F. (2d) 299, C. C. A. 7, such fact does appear, yet these Courts held in accordance with the established rule for office building service employees that such service employees were not covered by the Act.

In the case of *Rucker* v. *First Nat. Bank of Miami, Okl.*, 138 F. (2d) 699, C. C. A. 10, certiorari denied, 321 U. S. 769, the plaintiffs who were elevator operators in a six story office building owned and operated by the defendant instituted an action to recover overtime compensation and liquidated damages claimed to be due them under the provisions of the Fair Labor Standards Act of 1938. The first floor of this building was used by the defendant to carry on a national banking business. The remaining floors were leased to various tenants. Some of these tenants were companies elsewhere engaged in the production of goods for commerce which used the space leased by them solely for the purpose of housing their executive and administrative offices; the other tenants were engaged in interstate and intrastate commerce; none of the tenants, however, were shown to have been engaged in the production of goods in the building. The plaintiffs conveyed the tenants and the public to and from the upper floors in the building.

The Circuit Court of Appeals, Tenth Circuit, held that the plaintiffs were not engaged in commerce or in the production of goods for commerce within the meaning of the Fair Labor Standards Act of 1938 and affirmed a judgment of the United States District Court dismissing the plaintiffs' complaint. The Court in its opinion, among other things, said:

> "Specifically, we are urged to hold that these employees, as elevator operators, were engaged in the production of goods for commerce on the authority of Kirschbaum Co. *v.* Walling, supra. In that case the court held that elevator operators and other

building employees were engaged in the production of goods for commerce, because the services which they performed were so closely and intimately associated with the actual production of goods for commerce as to be in reality a part of the process. There, concededly, the tenants occupying the building were actually engaged in the production of goods for interstate commerce, and the elevator operators in the building ran both the freight elevators which started and finished the interstate journeys of goods going from and coming to the tenants, and the passenger elevators which carried employees, customers, salesmen and visitors. In holding that elevator operators, under these facts, were engaged in the production of goods for commerce, the court said [316 U. S. 517, 62 S. Ct. 1121, 86 L. Ed. 1638]: 'in our judgment, the work of the employees in these cases had such a close and immediate tie with the process of production for commerce, and was therefore so much an essential part of it, that the employees are to be regarded as engaged in an occupation "necessary to the production of goods for commerce."' But, the court significantly observed that the criterion was necessarily one of degree and must be so considered in defining coverage under the phrase 'production of goods for commerce.' See, also, Warren-Bradshaw *v.* Hall, supra; Walling *v.* Patton-Tulley Transp. Co., 6 Cir., 134 F. (2d) 945; Hanson *v.* Lagerstrom, 8 Cir., 133 F. (2d) 120, and Consolidated Timber Co. *v.* Womack, 9 Cir., 132 F. (2d) 101.

"But the facts before us which bear upon the phrase 'production of goods for commerce' are only remotely analogous to the facts in the Kirschbaum case. The executive and administrative offices of the mining and smelting company were located in the building serviced by the elevator operators, and this company was doubtless engaged in the production of goods for commerce, but it is not shown on this record whether any of the goods were produced in the building, or that any of the employees transported to and from the offices are directly or indirectly engaged in the production of the goods. The same is true of the chat and crushed rock company, and the abstract company, which produced abstracts, some of which

were shipped in interstate commerce. In any event, the relationship is not shown to be 'close and immediate'. Under these facts it cannot be said that the activities of the elevator operators were an essential part of, or necessary to, the production of goods for commerce." (pp. 701, 702)

In the case of *Johnson* v. *Dallas Downtown Development Co.*, 132 F. (2d) 287 C. C. A. 5, certiorari denied, 318 U. S. 790, the appellants were porters and elevator operators in a building which housed, among other tenants, the agents of concerns elsewhere engaged in the production of goods for interstate commerce. In holding that such appellants were not covered by the Act the Circuit Court of Appeals, Fifth Circuit, in its opinion, among other things, said:

"we do not think that Congress intended that the Act with respect to those who are only 'engaged in commerce' should be stretched and strained to cover every person whose labor is of use or convenience or whose labor in some fashion contributes to the comfort or convenience of one who is so engaged. Overstreet *v.* North Shore Corporation, 5 Cir., 128 F. 2d 450. Clearly, Congress intended the coverage of the Act to stop somewhere, and the line bounding coverage must be drawn somewhere.

"In the Arsenal Building-Kirschbaum cases, supra, it is said by the Supreme Court: '"There is thus no point in the instant case in a demand for the drawing of a mathematical line. And what is reasonably clear in a particular application is not to be overborne by the simple and familiar dialectic of suggesting doubtful and extreme cases." Santa Cruz Fruit Packing Co. *v.* Labor Board, 303 U. S. 453, 467, 58 S. Ct. 656, 660, 82 L. Ed. 954. "What is needed is something of that common-sense accommodation of judgment to kaleidoscopic situations which characterizes the law in its treatment of problems of causation." Gully *v.* First National Bank, 299 U. S. 109, 117, 57 S. Ct. 96, 100, 81 L. Ed. 70.'

"Applying the common sense rule, we hold that Appellants are not within the coverage of the Act." (pp. 289-290)

Applying the common sense rule in the case at bar, respondents are not engaged in occupations necessary to the production of goods which production is carried on by the petitioner in its plants and factories distantly located from the building wherein the respondents work.

In the case of *Johnson* v. *Masonic Bldg. Co.*, 138 F. (2d) 817, C. C. A. 5, certiorari denied 321 U. S. 780, the plaintiffs were elevator operators and porters working in an office building which housed, among others, a company elsewhere engaged in the production of bricks and tiles for interstate commerce and a coal company elsewhere engaged in the production of coal for interstate commerce.

In the case of *Lofther* v. *First Nat. Bank of Chicago*, 138 F. (2d) 299, C. C. A. 7, the plaintiffs were elevator operators, janitors, a watchman and maintenance workers in a building which housed, among others, tenants elsewhere engaged in the production of goods for interstate commerce.

Judge Swan in his dissenting opinion in the case at bar followed the rule established by the aforesaid authorities and said that "the porters, elevator operators, and night watchmen of the defendant's office building are too remotely related to 'the production' of goods for commerce to be within the coverage of the Act. *Rucker* v. *First Nat. Bank of Miami, Okl.*, 10 Cir., 138 F. 2d 699, 702."

A search of the authorities reveals no state decisions in conflict with the aforesaid listed Federal cases or in support of the decision of the Circuit Court of Appeals for the Second Circuit in the case at bar or in support of its decision in the case of *Callus* v. *10 East Fortieth Street Building, Inc.*, 146 F. (2d) 438.

Significantly, practically all the United States District Court and Circuit Court of Appeals decisions holding that office building service employees are not covered by the Fair Labor Standards Act were handed down after this Court had decided that the loft building service employees in the case of *Kirschbaum Co.* v. *Walling*, 316 U. S. 517, decided June 1, 1942, were covered by such Act.

Significant too is the fact that after the decision of this Court in the case of *Kirschbaum Co.* v. *Walling, supra,* this Court denied certiorari in several office building service employee suits wherein such employees had been unsuccessful in the lower courts (*Rucker* v. *First Nat. Bank of Miami Okl.*, 138 F. (2d) 699, C. C. A. 10, certiorari denied Jan. 31, 1944, 321 U. S. 769; *Stoike* v. *First Nat. Bank of City of New York*, 290 N. Y. 195, certiorari denied Oct. 11, 1943, 320 U. S. 762; *Johnson* v. *Masonic Bldg. Co.*, 138 F. (2d) 817, C. C. A. 5, certiorari denied Feb. 28, 1944, 321 U. S. 780; *Johnson* v. *Dallas Downtown Development Co.*, 132 F. (2d) 287, C. C. A. 5, certiorari denied April 19, 1943, 318 U. S. 790; *Convey* v. *Omaha Nat. Bank*, 140 F. (2d) 640, C. C. A. 8, certiorari denied March 6, 1944, 321 U. S. 781; *Tate* v. *Empire Bldg. Corporation*, U. S. D. C., E. D. of Tenn., 2 W. H. Cases 472, not officially reported, affirmed 135 F. (2d) 743, C. C. A. 6, certiorari denied Oct. 11, 1943, 320 U. S. 766; *Rosenberg* v. *Semeria*, 137 F. (2d) 742, C. C. A. 9, certiorari denied, *sub nom Semerio, et al.* v. *Rosenberg*, Oct. 18, 1943, 320 U. S. 770).

The rule promulgated in these cases should now receive this Court's explicit sanction.

Conclusion

The judgment of the Circuit Court of Appeals for the Second Circuit should be reversed.

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REPLY BRIEF FOR THE PETITIONER

FILED
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CHARLES ELMORE CROPLEY
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Supreme Court of the United States

OCTOBER TERM, 1944

No. 688

THE BORDEN COMPANY,

Petitioner,

against

JOSEPH BORELLA, CHARLES J. BURKE, WALTER CROSS, WILLIAM L. DeGRAAF, JOHN B. DONEGAN, STANLEY GAJDA, EDWARD GRAMCKO, STANLEY GRZECK, OLE HOFSETH, WILLIAM KAY, ALEXANDER KRUPICA, WILLIAM LENDO, THOMAS LO SASSO, ROBERT A. MARSHALL, WALTER C. MENYHART, JAMES McCARTHY, MICHAEL NOVEMBER, LEONARD B. QUINN, ANDREW RUEB, THOMAS M. TREACY AND JESUS ECHEVARRIA,

Respondents.

REPLY BRIEF FOR PETITIONER

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REPLY BRIEF FOR PETITIONER

I

In the Administrator's Brief (page 10) the following statement is made with respect to the opinion of the Circuit Court of Appeals for the Second Circuit in the case at bar:

> "The court reasoned that those 'who direct the whole conduct of an industry' are engaged in 'production' as clearly as are the artisans in the factory or the dispatching clerks on the shipping platforms, ...".

That statement is diametrically opposed to the statement made by the Circuit Court of Appeals for the Second Circuit in the following part of its opinion in which it fixed the status under the Act of those employees "who direct the whole conduct of an industry":

> "The definition of 'produced' in §3(j) concludes with the clause: 'process or occupation necessary to the production thereof.' True, the Supreme Court in *A. B. Kirschbaum Co.* v. *Walling, Administrator, supra,* 525 (316 U. S. 517) cautioned us against pressing too literally the word 'necessary,' but that caution need not disturb us here. Those who direct the whole conduct of an industry—both manufacture and distribution—are 'necessary' to 'production,' if anyone is 'necessary.' As was observed over a century ago, every process of manufacture (indeed for that matter every process by which men can affect the outside world at all) may be resolved into the movement of things in space, and it would be absurd to say that, although what the artisans do in the factory, or the dispatching clerks do upon the shipping platforms, is 'necessary' to 'production,' the directions they receive that govern all the movements they impart, are not 'necessary.' " (R. 131, 132)

II

Under Point I, subdivision A, of the Respondents' Brief, the respondents take issue with the petitioner's stand that the fundamental question in the case at bar is whether the respondents are engaged in occupations necessary to production and that the determination of this question is dependent upon a judicial construction of the word "necessary" as used in Section 3 (j) of the Act. At page 34 of their brief the respondents make the following statement:

> "We disagree with this statement of the issues in this case. In our opinion the *Kirschbaum, Walton* and *Armour* cases, *supra,* effectively settle the mean-

ing of the word 'necessary' as applied to the facts of this case."

The *Kirschbaum, Walton* and *Armour* cases did not settle the meaning of the word "necessary" as applied to the facts in the case at bar. The facts in the *Kirschbaum, Walton* and *Armour* cases are entirely different from the facts in the case at bar; the circumstances under which the employees in those cases worked were entirely different from the circumstances under which the respondents in the case at bar worked.

In the case of *Kirschbaum Co.* v. *Walling*, 316 U. S. 517, this Court held that the work of the building service employees therein considered was "necessary" to the production of goods for commerce. In arriving at this conclusion this Court had to determine the scope or meaning of the word "necessary" as applied to the facts in that case. This is borne out by the following statement in the Court's opinion: "We cannot, in construing the word 'necessary,' escape an inquiry into the relationship of the particular employees to the production of goods for commerce". (p. 525)

That is precisely what this Court must do in the case at bar. It must inquire into the relationship between the respondents whose activities are confined exclusively to the petitioner's office building at No. 350 Madison Avenue and the production of goods for commerce as carried on by the petitioner in its plants and factories throughout the United States and Canada.

The Circuit Court of Appeals for the Second Circuit in its opinion in the case at bar, concerned itself almost entirely with the consideration of the meaning or scope of the term "necessary" as used in Section 3 (j) of the Act. It was because the Circuit Court of Appeals, in the petitioner's opinion, unreasonably broadened the meaning of this term to include the respondents that the petitioner applied to this Court for certiorari.

The respondents maintain that the real question in the case at bar is "whether the activities of the *occupants* of the Borden Building constitute 'production of goods for commerce' within the meaning of the Act". (Brief for Respondents, p. 34).

The administrator and the respondents both contend that the executive, administrative and clerical employees in the Borden Company office building at No. 350 Madison Avenue are so connected with the production of goods as carried on by the petitioner in its plants and factories throughout the United States and Canada that they are a part of such production and that they are not merely engaged in occupations necessary to such production.

The Circuit Court of Appeals for the Second Circuit in its opinion in the case at bar, however, did not agree with the contention of the administrator or of the respondents. That court stated that those who direct the conduct of an industry are engaged in occupations necessary to production. It did not hold that such employees are actually engaged in production, and statements to that effect appearing in the respondents' brief, and in the administrators' brief, are absolutely erroneous.

The administrator's and the respondents' contention is furthermore entirely inconsistent with the following statement made by this Court in the case of *Kirschbaum Co.* v. *Walling*, 316 U. S. 517 at pages 524-5:

> "Nor can we find in the Act, as do the petitioners, any requirement that employees must themselves participate in the physical process of the making of the goods before they can be regarded as engaged in their production. Such a construction erases the final clause of Section 3 (j) which includes employees engaged 'in any process or occupation necessary to the production' and thereby does not limit the scope of the statute to the preceding clause which deals with employees 'in any other manner working on such goods'."

According to this statement, there are two types of employees who are engaged in the production of goods for commerce as that term is defined in Section 3 (j) of the Act, viz., those engaged in the physical process of making goods and those who are engaged in occupations necessary to the physical process of making goods.

The administrator's and the respondents' contention does violence to the lucid terminology used in Section 3 (j). In this section it is provided that "an employee shall be deemed to have been engaged in the production of goods if such employee was employed in producing, manufacturing, mining, handling, transporting or in any other manner working on such goods * * *". To come within this part of the definition of production it is clear that an employee must physically work on the goods. The next part of the definition "or in any process or occupation necessary to the production thereof * * *" covers those employees who are engaged in activities essential to such physical production of goods.

The administrator and the respondents also contend that those employees in the Borden Building who prepare writings, communications, mats for lables, and advertisements, photostats and photo offsets, are engaged in the production of goods for commerce within the meaning of the Act. The employees who are engaged in doing this work are not covered by the Act. (*Walling* v. *Goldblatt Bros., Inc.*, 128 F. (2d) 778, (C. C. A. 7th) Cert. Denied 318 U. S. 757.) None of the advertisements or labels are printed in or distributed from the said Borden Building (R. 118, 119). The communications, photostats, and photo offsets are the means used by the Company for the dissemination of information and instructions among the employees employed in its producing plants. All of these so-called goods are transmitted exclusively to the offices and plants of The Borden Company and its subsidiaries and none of which is sold or offered for sale.

These materials are not comparable with the messages which this Court held were goods within the meaning of the Act in the case of *Western Union Telegraph Co.* v. *Lenroot*, U. S. , 89 L. ed. 289.

If these activities constitute the production of goods for commerce then any person who dictates a letter for transmission across the state line is engaged in the production of goods for commerce. This would be a startling extension of the meaning of the term "production of goods."

At page 45 of their brief, the respondents list those things which they claim are "goods" produced by the employees in the Borden Building; and at page 12 of the administrator's brief, the administrator sets forth those things which he claims are "goods" produced by the employees in the Borden Company Building. With respect to the photostats and the photo offsets, the amount thereof which originates in the Borden Building is infinitesimal as compared with the total production of goods by the Borden Company (R. 100). There is no proof in the record to support the assertion in the respondents' brief on page 30 relating to the experimental kitchen that booklets of recipes were prepared for housewives or that such booklets were sent to Borden customers. With respect to the balance of the so-called "goods" which are alleged to be produced by the employees in the Borden Building the record is barren of any evidence regarding the amount thereof. This is fatal to the respondents' and the administrator's case.

III

The respondents claim that they were "engaged in interstate commerce" within the meaning of the Act. There is no merit in this contention. The Circuit Court of Appeals for the Second Circuit held that since the decision of this Court in the case of *McLeod* v. *Threlkeld*, 319

U. S. 491, it is clear that the respondents are not engaged in commerce (R. 129). The administrator has not advanced this contention in his brief.

Conclusion

The judgment of the Circuit Court of Appeals for the Second Circuit should be reversed.

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